Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery and FPR-II, LLC d/b/a Leadpoint Business Services *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters. Case 32–CA–160759

January 12, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charges filed by Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union), the General Counsel issued the complaint on October 23, 2015, alleging that Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (BFI) and FPR-II, LLC d/b/a Leadpoint Business Services (Leadpoint), a joint employer (collectively the Respondent), have violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 32–RC–109684.[1] (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) BFI and Leadpoint each filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 13, 2015, the General Counsel filed a Motion for Summary Judgment. On November 16, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. BFI filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

BFI admits its refusal to bargain, but contests the validity of the certification of representation on the basis of its contention, raised and rejected in the representation proceeding, that it is not an "employer" under the Act of the unit employees. Thus, in its answer, BFI asserts that it has no obligation to bargain with the Union.

Leadpoint denies that the Respondent refused to bargain, asserting a lack of knowledge or information. As affirmative defenses, Leadpoint asserts that the complaint does not state facts sufficient to constitute an unfair labor practice in violation of the Act, and that the complaint does not state a claim upon which relief can be granted. In addition, Leadpoint asserts that relief cannot be granted based on the doctrines of laches, waiver, and/or unclean hands;[2] that the requested remedy is inappropriate as a matter of law; that the complaint is unconstitutionally vague and violates the Act and the Board's Rules and Regulations by providing insufficient facts to show that the Board fully investigated the charges before issuing the complaint; and that the complaint is improperly pled, because it does not provide Leadpoint enough information to answer the allegations.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

[1] 362 NLRB No. 186 (2015).

[2] The Respondent has not offered any explanation or evidence to support these bare assertions. Thus, we find that these affirmative defenses are insufficient to warrant denial of the General Counsel's Motion for Summary Judgment in this proceeding. See, e.g., *George Washington University*, 346 NLRB 155 fn. 2 (2005), enfd. 2006 WL 4539237 (D.C. Cir. 2006); *Circus Circus Hotel*, 316 NLRB 1235 fn. 1 (1995). In addition, the Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Entergy Mississippi, Inc.,* 361 NLRB No. 89, slip op. at 2 fn. 5 (2014), affd. in relevant part --- F.3d --- (5th Cir. Dec. 7, 2015), citing *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258 (1969); see *NLRB v. Quinn Restaurant Corp.,* 14 F.3d 811, 817 (2d Cir. 1994).

[3] Member Miscimarra dissented from the Board's Decision on Review and Direction in the underlying representation proceeding reported at 362 NLRB No. 186. He would have adhered to the joint employer test that had existed for 30 years without judicial criticism prior to the issuance of that case. While Member Miscimarra remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, Member Miscimarra agrees with the decision to grant the motion for summary judgment.

FINDINGS OF FACT

I. JURISDICTION

At all material times, BFI, a corporation with an office and place of business in Milpitas, California, has been engaged in the business of providing waste removal.

During the 12-month period ending September 30, 2015, BFI, in conducting its operations described above, purchased and received at its Milpitas, California facility goods and services valued in excess of $50,000 directly from points outside the State of California.

We find that BFI is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following named individuals held the positions set forth opposite their respective names and have been agents of BFI within the meaning of Section 2(13) of the Act:

Mike Caprio	President
Catharine D. Ellingsen	Senior Vice President, Human Resources

A. The Certification

Following the representation election held on April 25, 2014, the Union was certified on September 14, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by FRP-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California, excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated September 9, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. By letter dated September 21, 2015, the Respondent refused to do so.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(a)(5) and (1) of the Act.

The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has failed and refused to bargain with the Union, we shall order it to bargain on request with the Union and, if an agreement is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (BFI) and FPR-II, LLC d/b/a Leadpoint Business Services (Leadpoint), a joint employer, Milpitas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by FRP-II, LLC d/b/a Leadpoint Business Services and Browning-Ferris Industries of California, Inc.

d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Road, Milpitas, California, excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Milpitas, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 21, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., January 12, 2016

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Kent Y. Hirozawa,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a written agreement:

All full-time and regular part-time employees employed by us at our facility located at 1601 Dixon Landing Road, Milpitas, California, excluding employees currently covered by collective-bargaining agreements, office clerical employees, guards and supervisors as defined in the Act.

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY AND FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES

The Board's decision can be found at www.nlrb.gov/case/32-CA-160759 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.